LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
NOV 5 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-178

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, COMMISSIONER JOHN P. FRANKLIN, REV. H. H. BATTLE, McCLELLAN COOK, MRS. C. M. HOOPER, JAMES L. JENKINS, EDWARD S. PROCTOR, and CORLEY R. YOUNG, members and JAMES W. HENRY, Superintendent,

Petitioners,

v.

JAMES JONATHAN MAPP, *et al.*,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

WITT, GAITHER, ABERNATHY & WILSON

RAYMOND B. WITT, JR.
JOHN T. HENNISS
W. FRANK BROWN, III

1100 American National Bank Building
Chattanooga, Tennessee 37402

Attorneys for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-178

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, et al.,

Petitioners

v.

JAMES JONATHAN MAPP, et al.,

Respondents

PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Respondents' Brief in Opposition to Certiorari incorrectly characterizes the Board's petition as being based solely upon a finding of good faith.

Not so. While the finding of good faith

cannot be ignored, the novel question and issue presented more accurately is whether or not the drastic remedial techniques permitted in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) are mandatorily required of all formerly de jure school systems without a prior finding of default and where the school board has conformed with Brown v. Board of Education of Topeka (I), 347 U.S. 483 (1954) and Brown v. Board of Education of Topeka (II), 349 U.S. 294 (1955) and subsequent cases.

In this case the normal judicial processes placed Petitioners in compliance with the Constitution following the hearing in district court in 1965 on Respondents' Motion for Further Relief. That motion requested the district court to direct Petitioners to operate the school system "without regard to race." As a result of said hearing,

student desegregation was accelerated by complete elimination of the dual zones in September of 1966 pursuant to the order of the district court. Respondents appealed such decision and the district court was affirmed, 375 F. 2d 75 (6th Cir. 1967), with the single exception of faculty desegregation. The case was remanded for further proceedings on this issue pursuant to Bradley v. School Board of City of Richmond, 382 U. S. 103 (1965) decided after the district court decision. Respondents did not choose to petition this Court for a writ of certiorari.

From the date the Respondents' time for filing a petition expired in 1967 until 1968 when Green v. County School Board of New Kent County (391 U. S. 430) was decided the Board was in compliance except for faculty desegregation as evidenced by the decision of the district court,

the Court of Appeals for the Sixth Circuit, and acquiesced in by the Respondents in view of their decision against filing a petition with this Court.

To place the "default" label upon a board of education during this period of time and under these circumstances would have no support in fact, logic or law.

Even after the decision in Green, and considering the peculiar facts presented there, it was a reasonable interpretation to assume that the affirmative duty, first specifically so characterized by Green, could be discharged by making decisions without regard to race. Since New Kent County had only two schools, and since there was no residential segregation in the county, there were obvious options available to the school board which would have accomplished substantial desegregation of both schools and would have

avoided any reference to a decision based upon race. For example, the adoption of zoning in any reasonable fashion would have effectively desegregated both schools.

This Court held in Swann, at page 11, that it has not "deviated in the slightest degree from that holding [Brown I] or its constitutional underpinnings." There was no showing that the Petitioners have in any way taken any racially discriminatory action since its 1962 desegregation plan was fully implemented in September of 1966. Thus, the Chattanooga Board of Education, which was not in default before Green, did not become in default after Green.

That the affirmative duty concept did not invalidate the "without regard to race" standard was further supported by Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969)

where this Court defined a unitary school system as one "within which no person is to be effectively excluded from any school because of race or color." (p. 20)

The general characteristics of the affirmative duty imposed upon school boards by Green was clarified with the decision by this Court in Swann determining that decisions based upon race for the purpose of achieving student desegregation were permissible.

However, Swann has introduced massive confusion as many district courts have interpreted Swann to mandatorily require the use of such techniques based upon race regardless of the circumstances.

Respondents' position begs the question. They now abandon their quest for a system operated without regard to race, and overlook entirely

the central question here presented, seeking to exploit the confusion mentioned above. Respondents themselves ignore the default requirement, concentrating upon the remedy, demanding the mandatory application of these techniques based upon race without regard to the consistent efforts of Petitioners to comply with the Constitution.

If the Respondents' interpretation is correct, boards which acted in good faith are placed in exactly the same unconstitutional posture as boards which have used every known device to avoid, evade or delay compliance by any means.

Unless some significance is attached to the default language found in Swann, the result is that all school boards with an admitted history of de jure dual school systems are placed in the category of being mandatorily required to utilize the unusual and extreme techniques and tools (based

upon race) used in Charlotte.

There are repeated instances in Respondents' Brief in Opposition reflecting misunderstanding of Petitioners' position. Simply put, and as Petitioners repeatedly offered to stipulate before and during the hearing (App. 86, 87, Tr. 162, 236, 1345), Petitioners did not make any decisions based upon race for the purpose of achieving the greatest degree of desegregation with reference to students at any time prior to the May, 1971 hearing and prior to the decision of this Court in Swann entered on April 20, 1971. If such was essential in order to avoid the default label of Swann, then Petitioners were in default and have never so represented to the contrary.

Respondents' complaint is that insufficient desegregation existed in the system and that results in terms of something similar to racial

ratios are the only means of establishing the existence of a system that has removed the vestigial remains.

It would appear that the default language in Swann has no meaning unless it is interpreted to provide a factual basis, as well as a rationale, to make it possible for district courts to classify formerly de jure school systems as in default or not in default. All southern school systems were de jure in May of 1954. But the response of all de jure school boards since 1954 has not been identical to that reflected in Charlotte-Mecklenburg causing the district court to find that system "totally in default."

Petitioners submit that if default has any meaning as to formerly de jure school systems, Chattanooga was not in default in 1971. The district court erred in mandatorily imposing tech-

niques based upon race without consideration of the issue of default.

Conclusion

For these reasons, and those already presented in our Petition for Writ of Certiorari, we respectfully submit that this Court should grant certiorari in this case.

Respectfully submitted,

RAYMOND B. WITT, JR.
JOHN T. HENNISS
W. FRANK BROWN, III
Counsel for Petitioners
1100 American National Bank Bldg.
Chattanooga, Tennessee 37402